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No.

In the

Supreme Court of the United States

STERLING CONSULTING CORPORATION,
a Colorado corporation, as receiver for the
Indian Motorcycle Manufacturing Inc.,
a New Mexico corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

The Tenth Circuit Court of Appeals has held that the tax exception of the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and the Anti-Injunction Act, 26 U.S.C. § 7421(a) prohibit the United States District Court for the District of Colorado from ordering the Internal Revenue Service of the United States of America to conclude its audit and make its assessment in the receivership action. This holding raises three substantial federal questions that warrant immediate review by this Court:

1. Whether the determination by the Tenth Circuit of Appeals violates the separation of powers provisions of the United States Constitution, and therefore conflicts with the decisions of this Court in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-60 (1982), by ceding an inherent power of the District Court to another branch of government?

2. Whether the IRS's voluntary intervention in an *in rem* case subjects the IRS to orders of the District Court entered in the ordinary course of resolving the *in rem* case under well-settled principles of law established by this Court in *The Siren,* 74 U.S. (7 Wall) 152,154 (1868) and *United States v. The Thekla,* 266 U.S. 328, 340-341 (1924)?

3. Whether the facts of this case bring it within either of two judicially-created exceptions to the prohibition on declaratory judgments regarding federal taxes under *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-737 (1974)?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Sterling Consulting Corporation, a Colorado corporation, as receiver in *In Re: Indian Motorcycle Manufacturing, Inc. and Concerning the United States of America,* 95-Z-777 (D-Colo., 1995); and

Internal Revenue Service of the United Stated of America

CORPORATE DISCLOSURE STATEMENT

Petitioner, Sterling Consulting Corporation, is the only party that is a corporation. It is not publicly held and no publicly held company owns any shares of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Sterling Consulting Corporation, (the "receiver") respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. Relying on the "tax exception" of the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (the "Act") and the Anti-Injunction Act, 26 U.S.C. § 7421 (a), the court of appeals decided that the United States District Court for the District of Colorado ("District Court") had no jurisdiction to establish procedures requiring the IRS to address the federal income tax liabilities of the corporation subject to the receivership even though the IRS had intervened in the action. That decision is contrary to well-established principles governing *in rem* actions recognized long ago by this Court. It conflicts with decisions of Courts of Appeal for the Ninth Circuit; *Cororporacion Mexicana de Servicios Maritimos, S. A. di C. V. v. The M/T Respect,* 89 F.3d 650,656 (9th Cir. 1996); *United States v. State of Oregon,* 657 F.2d 1009, 1015-1016 (9th Cir. 1981), as well as the Tenth Circuit decision in *Alvarado v. J.C. Penney Co.,* 997 F.2d 803, 805 (10th Cir. 1997). It should therefore be reversed.

OPINION BELOW

The decision of the court of appeals is reported at 245 F.3d 1161 (10th Cir. 2001).

The orders of the District Court from which the IRS appealed are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2001. The Receiver's Motion for Rehearing by Panel an *En Banc* was denied on August 7, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court in the underlying case had jurisdiction pursuant to 28 U.S.C. § 1332.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

See Appendix

STATEMENT OF THE CASE

A. The Proceeding Below.

In 1995, Eller Industries, Inc. commenced this action to appoint a receiver for Indian Motorcycle Manufacturing, Inc. ("IMMI"). The Colorado District Court had jurisdiction under 28 U.S.C. § 1332(a)(1) and appointed Petitioner receiver (the "receiver") of the corporation and its assets. IMMI was one of six American companies with a colorable claim to the famous Indian Motorcycle trademark (the "Trademark"). In addition to IMMI, the Receiver obtained de facto control over two of the other companies with colorable claims to the Trademark. The three remaining companies with colorable claims to the Trademark were in bankruptcy (the "Bankruptcy Cases"), and were Administratively Consolidated before the United States Bankruptcy Court for the District of Massachusetts (the "Massachusetts Bankruptcy Court"). With the approval of the Colorado District Court and the Massachusetts Bankruptcy Court, the assets of the Receivership Estate and

the Bankruptcy Cases were sold in early 1999 for cash and other consideration as a single lot to a single purchaser.

Two years prior to the sale, the IRS moved to intervene in the Receivership Action pursuant to F.R.C.P. 24, claiming intervention was necessary "to protect its legally recognizable interest in the assets of defendant." The IRS motion and the order allowing intervention had no condition or limit to its status as intervenor on its face. After becoming a party to the Receivership Action, the IRS participated in hearings before both courts concerning the disposition of the sale proceeds and admitted it was subject to the personal jurisdiction of the District Court.

As more fully explained below, the IRS appeal to the Tenth Circuit arose from orders of the District Court granting the receiver's motion to have the District Court approve federal income tax returns for certain tax years of IMMI and a related corporation, Indian Motor Co. ("Motor"). The IRS objected, claiming that the District Court lacked jurisdiction to grant this relief. After notice and hearing, the District Court overruled the IRS's objections; determined it had jurisdiction; directed the IRS to respond to the merits of receiver's motion, but also found the jurisdictional issue was ripe for appeal under 28 U.S.C. § 1292(b) (App 12-19). The court of appeals granted the IRS's petition to take an interlocutory appeal and thereafter reversed the District Court.

B. Statement of Facts

In February 1999, with the approval of the Colorado District Court and the Massachusetts Bankruptcy Courts, the combined assets of the Receivership Estate and Bankruptcy Cases were sold for approximately $18 million and other considerations as a single lot to a single purchaser. An

escrow of $3.5 million was established to pay claims in the Bankruptcy Cases, subject to certain conditions. The tax and related jurisdictional issues arose from the following events in the Colorado District Court and Massachusetts Bankruptcy Court:

In September 1999, the Massachusetts Bankruptcy Court approved a settlement between the Receiver and the trustee in the Bankruptcy Cases (the "Trustee") regarding the allocation of the sale proceeds. As a part of the settlement it was agreed that, in addition to federal tax returns for the Receivership Estate, the Receiver would ask the Colorado District Court approve the federal tax returns of the Bankruptcy Cases on an expedited basis.

On October 29, 1999, the Receiver requested an order from the Colorado District Court determining that no additional taxes were owed by the Bankruptcy Cases ("First Tax Motion"). The IRS objected asserting lack of jurisdiction. Its objection was overruled, first by the Magistrate Judge supervising the Receivership on January 10, 2000 and then by the Colorado District Court on March 16,2000.

Before the Colorado District Court order of March 16, 2000, the following occurred in the Massachusetts Bankruptcy Court:

1. On December 22, 1999, the Trustee moved for Massachusetts Bankruptcy Court approval of his final accounts so he could make distributions to creditors before the end of 1999 and thereby avoid the issue of income taxes derived solely from holding the sale revenues beyond the year end of the Bankruptcy Cases ("Trustee's Account Motion") As a part of that motion, and pursuant to the September 1999 settlement, the Trustee was obligated to distribute $1.2 million to the Receiver to be held in escrow

pending resolution of the tax issues facing the Bankruptcy Cases.

2. The IRS objected to the Trustee's Account Motion at a hearing before the Bankruptcy Court on December 28. Because it claimed the tax liabilities of the Bankruptcy Cases were approximately $1.2 million, the IRS asserted the $437,000 escrow was insufficient.

3. On December 30, the Massachusetts Bankruptcy Court entered findings of fact and conclusions of law approving the Trustee's final accounts, as modified by the agreement of the Trustee and Receiver and, *inter alia,* ordered the Trustee to deliver $1.2 million in escrow to the Receiver. The escrow was to be distributed first to the IRS to pay income taxes of the Bankruptcy Cases, then to bankruptcy creditors until paid in full, and then to the receiver ("Final Accounts Order"). The Final Accounts Order repeated the receiver's agreement "to prosecute the [First Tax Motion] in an expeditious manner and to seek a determination of the non-liabilities of the [Bankruptcy Cases] for any taxes to the IRS."

4. On January 7, 2000, the IRS appealed the Final Accounts Order to the Massachusetts Bankruptcy Appellate Panel for the First Circuit (the "BAP") and later prevailed. In April 2001, the BAP reversed the Final Accounts Order, holding that the Massachusetts Bankruptcy Court could not cede jurisdiction to determine the tax liabilities of the Bankruptcy Cases to the District Court and that the Massachusetts Bankruptcy Court lacked jurisdiction to estimate their tax liabilities before the IRS had made an assessment.

Back in the Colorado District Court, on March 3, 2000, while the IRS appeal was pending, the receiver filed its Second Tax Motion and a supporting affidavit of its

president. That motion sought an order from the Colorado District Court that the federal tax returns of IMMI and Motor for 1993 through 1999 were true and correct and that the receiver owed no taxes other than as stated in the returns. The orders of the Magistrate Judge and later the Senior Judge granting the Second Tax Motion produced the IRS appeal to the Tenth Circuit and ultimately this petition.

The IRS's objection to the Second Tax Motion asserted the District Court lacked subject matter jurisdiction because the IRS had not waived sovereign immunity. Alternatively, if the court had jurisdiction, the IRS sought additional time to respond. On May 10, 2000, the Magistrate Judge overruled the IRS jurisdictional objection and ordered it to respond to the merits by August 31, 2000. If the IRS did not conclude its consideration of the tax returns by that date, the returns would be deemed to have been completed correctly with no further tax liability.

The IRS objected to the Magistrate's ruling to the District Court. The District Court overruled the IRS's objection to the May 2000 order on July 17, 2000. In doing so, the District Court found and concluded:

A. Until the tax liabilities of the Bankruptcy Cases, IMMI, and Motor were determined, it would not be feasible to wind-up the receivership.

B. The Magistrate Judge's May 2000 Order "represents an effort to resolve the question of the tax liabilities so that the receivership can be terminated."

C. "When the United State intervened in this case, it subjected itself to the Court's jurisdiction with regard to the receivership. As IMMI and Motor are property of the Receivership Estate, the Court has jurisdiction to order the

IRS to determine the tax liability of IMMI and Motor within a reasonable deadline."

REASONS FOR GRANTING CERTIORARI

I. THE TENTH CIRCUIT OPINION IS IN CONFLICT WITH THE SEPARATION OF POWERS REQUIREMENTS OF THE UNITED STATES CONSTITUTION. AND IS CONTRARY TO PRIOR OPINION OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

At bottom, this is a separation of powers case. Receiverships are strictly judicial branch events and, as such, receivership actions are not subject to interference from the other two branches. Incursions into the exclusive judicial domain of receivership actions by the executive branch has not been tolerated by this Court previously, and should not be tolerated now.

Only once has Congress altered the District Courts' unfettered control over receiverships and the parties to receiverships by statute, and it did this by expanding the jurisdiction of other courts and allowing them to hear cases against receivers in certain, limited circumstances. 28 U.S.C. § 959 was enacted to resolve a conflict between the jurisdiction of District Courts in receiverships and the Seventh Amendment right to a trial by jury.[1] If Congress

[1]The second sentence of F.R.C.P. 66 (which codified the power of a District Court to appoint a receiver) reads: "The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts." This facially simple sentence is, in fact, quite complicated, and contains law that is not apparent from the face of the section. The annotations that follow Rule 66 state: "The second clause of the sentence merely incorporates the well-known and

were ever to try to narrow receivership court jurisdiction it would violate the doctrine of separation of powers.

The Constitution nowhere contains an express injunction to preserve the boundaries of the three broad powers it grants. This Court has developed two separate doctrines for resolving separation of powers issues commonly referred to as the "formalist" and the "functional" doctrines.

The formalist approach emphasizes the necessity to maintain three distinct branches of government through the drawing of bright lines demarcating the three branches from each other determined by the differences among legislating, executing, and adjudicating.[2] The functional approach emphasizes the core functions of each branch and asks whether the challenged action threatens the essential

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general rule that, absent statutory authorization, a federal receiver cannot be sued without leave of the court which appointed him, applied in the federal courts since *Barton v. Barbour* (1881) 104 U.S. 126. *See also* 1 Clark on Receivers (2d ed.) Sec. 549."

The rule in the *Barton* case referred to in the annotation is the broad rule that receivers may only be sued in the court that appointed them. The rule in *Barton* was iron-clad, even to the point that it defeated the right of a plaintiff injured by a receiver to have the claim heard by a jury or heard in the district where the tort occurred. In enacting 28 U.S.C. § 959, Congress provided a means for a very limited universe of plaintiffs to sue receivers in foreign jurisdictions (*i.e.*, outside the jurisdiction of the appointing court), and without leave of the appointing court.

[2]The pressure inherent within each of the separate branches to exceed the outer limits of its power . . . must be resisted. Although not expressly sealed from one another, the powers delegated to the three Branches are functionally identifiable. *INS v. Chadha*, 462 U.S. 919, 951 (1983); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-66 (1982) (plurality opinion); *Bowsher v. Synar*, 478 U.S. 714, 721 -727 (1986).

attributes of the legislative, executive, or judicial function or functions.[3]

The Tenth Circuit Opinion runs afoul of the separation of powers requirements of the Constitution regardless of which doctrine is utilized. The Court has already held that the power of the District Court to appoint a receiver and to administer the receivership estate is an inherent power of the District Court. *See* discussion in Section II, below. The Tenth Circuit Opinion ignores this and assumes Congress, without any thought or legislative history, intended to and succeeded in altering this Court's rulings that a District Court supervising a receivership has inherent authority to issue any order needed to collect, preserve, or distribute assets of the receivership.

As correctly pointed out by the Tenth Circuit Court's Opinion, the Declaratory Judgments Act, 28 U.S.C. § 2201(a), and the Anti-Injunction Act, 26 U.S.C. § 7421, (collectively, the "Tax Limitation Acts") both operate to draw a bright line of demarcation between the judicial branch and the executive branch by imposing a limit on the District Court. The Tax Limitation Acts prohibit the District Court from an incursion into the business of the IRS (*i.e.*, prohibit the District Court from declaring taxes before the IRS has completed its work and assessed a tax). They maintain the functional integrity of each branch. This would be the end of the story, and the Tenth Circuit Opinion would be correct, except for the intervention in an *in rem* case by the IRS.

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[3] *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 850-51, 856-57 (1986); *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 587 , 589-93 (1985). The Court had first formulated this analysis in cases challenging alleged infringements on presidential powers, *United States v. Nixon*, 418 U.S. 683, 713 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425, 442 -43 (1977), but it had subsequently turned to the more strict test. *Schor* and *Thomas* both involved provisions challenged as infringing judicial powers.

At its sole election, however, the IRS may abandon the insulation provided by the Tax Limitation Acts and submit itself and its issues to the District Court for determination. This may be done directly (*e.g.*, asking the District Court for relief) or indirectly (*e.g.*, by assessing a tax in a pending bankruptcy case or receivership case). In this case, it elected the former by intervening in an *in rem* case. By intervening in an *in rem* case, the IRS intervened for all purposes related to the *res* and waived sovereign immunity for all purposes related to the *res*.[4] To allow the contrary is

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[4]The receiver recognizes that in an *in personam* case the IRS can intervene for a limited purpose. In an *in rem* case, however, intervention by a sovereign is waiver of sovereign immunity for any purpose related to the res. *United States v. The Thekla*, 266 U.S. 328, 339-340 (1924) ("When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with respect to the subject matter."); *The Siren*, 74 U.S. (7 Wall) 152,154 (1868) ("[W]hen [the United States] proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and affirmative relief against them, beyond the demand or property in question."). *See also Cororporacion Mexicana de Servicios Maritimos, S. A. de C. V. v. The M/T Respect*, 89 F.3d 650,656 (9th Cir. 1996) (by intervening in an *in rem* action agency of the Mexican Government waived sovereign immunity for all issues related to the *res*).

It is important to note the IRS's intervention waives sovereign immunity to the *res* of the case in which it intervened. The most recent Court of Appeal explications of *The Siren* are found in *Miller v. Tony and Susan Alamo Foundation*, 134 F.3d 910, 916 (8th Cir. 1998) (*Miller II*), which succeeded *Miller v. Tony and Susan Alamo Foundation*, 975 F.2d 547 (8th Cir. 1992) (*Miller I*). In *Miller I*, the Millers had seized certain property and had it sold at auction to satisfy a judgment against the Foundation. The IRS had intervened, claiming a superior right to the $340,000 proceeds of the sale. The District Court had determined that Millers' claims prevailed over the IRS, and the IRS had appealed to the Eighth Circuit. The Eighth Circuit affirmed.

Separately, the IRS had seized other property (the "Fort Smith/Nashville Property") owned by the Foundation, and the Millers had sought in District Court for that property to be turned over to them. In this matter,

to allow the IRS to defeat the entire purpose of the receivership actions–for a Court to determine all claims to a *res* an then transfer it free and clear to a buyer–and thereby to

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which resulted in *Miller II*, the IRS argued that such was not the proper procedure for challenging the IRS's seizure, and that the United States had not waived sovereign immunity regarding the Fort Smith/Nashville Property. The District Court ruled that the prior intervention in the earlier proceeding regarding the $340,000 sale proceeds (*Miller I*) constituted a waiver of sovereign immunity regarding the Fort Smith/Nashville Property.

The Eighth Circuit reversed in *Miller II*, holding that the IRS intervention in the $340,000 matter, while a waiver of sovereign immunity for that matter, did not constitute a waiver of sovereign immunity regarding the Fort Smith/Nashville Property:

> We acknowledge the long-established principle "that when [G]overnment itself seeks its right at the hands of the court, equity requires that the rights of other parties interested in the subject-matter should be protected." Thus, when the United States brings a claim in court, it "'waives immunity as to claims of the defendant which assert matters in recoupment–arising out of the same transaction or occurrence which is the subject of the Government's suit.'" But this waiver does not extend "beyond the property in controversy." *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868). Those claims remain barred absent an unequivocal statutory waiver of sovereign immunity.
>
> These principles defeat the Millers' argument. The "property in controversy" the government intervened to claim was $340,000 in proceeds from the Millers' execution sale. Under the cases just cited, and more importantly under 26 U.S.C. 7424, the district court properly exercised jurisdiction over the Millers' adverse claim to that sum. It is equally clear, however, the government's intervention did not give the district court jurisdiction over the Millers' garnishment action on the Fort Smith/Nashville property. The Millers' execution sale proceeds and the Fort Smith/Nashville property are different matters, as we have observed before. (Some citations omitted).

violate the separation of powers requirements of the Constitution.[5, 6]

II. THE TENTH CIRCUIT OPINION INCORRECTLY RESOLVES A SEPARATION OF POWERS QUESTION BY CEDING A WELL-RECOGNIZED INHERENT POWER OF THE DISTRICT COURT WITHOUT ANY SHOWING CONGRESS INTENDED TO DO SO.

The Opinion below turns upon the assumption that Congress granted to District Courts supervising receiverships

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[5]This is not unfair to the IRS. All it need do to avoid this rule is not intervene as a party in a receivership. In this case, it had already filed a levy and gained nothing by its intervention.

[6]This same separation of powers issue has arisen repeatedly, the IRS continuing to disregard orders on the subject by the Courts. For example, *United States v. Middle States Oil*, 18 F.2d 231 (8th Cir. 1927), (cited as recently as 1993) holds:

> Counsel for the United States insist in their argument that the Court had no power to require the United States to file its claim within any particular time, and refer to the well-known doctrine that the United States is not bound by any statute of limitations. . . . The government insists that it has the right to file its claim for taxes apparently at any time it chooses, regardless of any orders or rules or procedure of the district court. We do not so understand our general scheme of government. The statute is not one involving any statute of limitations or question of laches, but involves a question of whether the administration branch of government may ignore and refuse to accede to rules of the judicial branch made for the purpose of carrying out orderly judicial procedure and administering justice. We see no reason why the court could not make the show cause order. [18 F.2d at 238 (emphasis added).].

See also Phelan v. Middle States Oil Corporation, 15 F.2d 88 (N.D. Tex. 1926) (where receivership was held open an extra year at the request of the Unites States Attorney so that taxes could be quantified, but still were not quantified, proper to pay all creditors over objection of IRS).

the authority to issue declaratory relief by enacting the Declaratory Judgments Act, 28 U.S.C. § 2401 (the "Act"). As the Act expressly excludes the authority to issue declaratory relief regarding taxes, the Court of Appeals reasoned, the District Court lacks authority to do so.

The error by the Court of Appeals was in failing to realize that District Courts supervising receiverships have inherent power to issue declaratory relief and had been exercising it long before the Act was passed. As Congress did not give the Courts this power, and since there is no reason to believe it was intending to limit this inherent power when Congress amended the Act to exclude tax issues, the Court of Appeals should have affirmed the District Court Order that the IRS (which had intervened in the Receivership Action) complete its assessment of any taxes due by the Receivership Estate by a reasonable date or be barred from assessing them later.

A. In this *In Rem* Action the District Court had Power to Issue Declaratory Orders, any other Provision of Title 28 Notwithstanding.

Prior to the passage of the Act receivership courts routinely entered declaratory relief.[7] They could do so because, once a receivership was established, a District Court had inherent power to issue any order necessary to wind-up a receivership. *E.g., Riehle v. Margolies*, 279 U.S. 218 (1929).

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[7] *E.g., Commonwealth Trust Co. v. Bradford* 297 U.S. 613 (1936) (entering declaratory judgment prior to the passage of the Act); *Harr v. Pioneer Mechanical Corporation*, 65 F.2d 332, 335 (2nd Cir. 1933) (court sitting in equity had inherent power to issue declaratory relief ancillary to case in chief); *Chicago Bank of Commerce v. McPherson*, 62 F.2d 393, 394 (6th Cir. 1932) (court sitting in equity had inherent power to issue declaratory relief ancillary to case in chief despite "federal rule against declaratory judgments.").

Riehle, still the leading case on receiverships, questioned whether a District Court had the authority to enter an injunction against a state court to prohibit its interference with the receivership being supervised by the District Court. At the time, the Judicial Code (then Title 26) expressly prohibited such an injunction.[8] The District Court entered an injunction anyway, and this Court affirmed, stating that a District Court supervising a receivership had the power to issue:

> any order . . . necessary for the preservation, collection, and distribution of the assets. . . .And it may, despite section 265 of the Judicial Code (28 U.S.C. § 379), issue under section 262 (28 U.S.C. § 377), or otherwise, all orders necessary to protect from interference all property in its possession exclusive jurisdiction to determine all judicial questions concerning that property.

Thus in *Riehle*, just as in this case, a statute expressly restricted the federal courts' power. The fact that *Riehle* was a receivership, however, made that restriction inapplicable. Under *Riehle*, a receivership court has inherent power to enter "any order necessary for the collection, preservation, and distribution of assets." This is true notwithstanding "any provision of Title 28 to the contrary." The Court of Appeals Opinion in the case at bar squarely conflicts with *Riehle*, and

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[8] "Section 265" of the judicial code, the current version of which is 28 U.S.C. § 2283, provided at the time of *Riehle*: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." 36 Stat. 1162, Ch. 231, A 265 (1911). *Riehle* was not a bankruptcy, it was a receivership, thus the express exception did not apply and the statute, on its face, did apply.

squarely conflicts with hundreds of years of receivership law which are to the same effect.

Riehle was not new receivership law. *Wabash Railroad v. Adelbert College,* 208 U.S. 38, 54 (1908) held:

> When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. . . . For the purpose of avoiding injustice which might otherwise result, a court during the continuance of its possession has, an incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property.

Once a receivership is established, it is necessary that a receivership court have such jurisdiction; otherwise, a receivership might never be wound up.[9] As a result, for hundreds of years receivership courts have exercised jurisdiction beyond what is provided for in Title 28 or, indeed, provided for in Article III of the United States Constitution. *See also White v. Ewing,* 159 U.S. 36, 39 (1895):

> [W]here an insolvent corporation is placed in the hands of a receiver of the circuit court,

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[9]Much of the development of what was originally called auxiliary, pendent, or ancillary jurisdiction and now called supplemental jurisdiction, as codified in 1990 at 28 U.S.C. § 1367, was driven by receivership cases. *E.g., Wabash R. Co. v. Adelbert College*, 208 U.S. 38 (1908). The reason behind this is obvious: If the Court has possession of a thing or *res*, it must be able to address all claims to that *res*, else it will not be able to deliver clean title when the *in rem* proceeding is concluded.

such appointment draws to the jurisdiction of that court the control of its assets, so far as persons having claims to participate in the distribution of such assets are concerned . . . . [Such] . . . parties must go into that court in order to assert their rights, prove their demands, and receive what ever may be due them, or their share or interest in the estate. [T]he Court proceeds **upon its own authority** to collect the assets of an estate, with the administration of which it is charged; and, if the receiver in such cases appears as a party to the suit, it is only because he represents the **court in its inherent power to wind up the estate of an insolvent corporation, over which it has by an original bill obtained jurisdiction.** (Emphasis added.)[10] When

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[10]Lest the Court think *Riehle, Wabash Ry., White, et al.* are aberrations, there are numerous other cases which contain the same general principal, *i.e.*, a court acting *in rem* may enter any order necessary to collect, preserve, and distribute assets. *Ex parte Baldwin*, 291 U.S. 610, 615 (1934) (court may issue injunction to protect its jurisdiction from interference due to general principle that, where a court of competent jurisdiction has, through its officers, taken property into its possession, the court may issue all writs necessary to protect its possession from physical interference); *United States v. Tabor Court Realty Corp*, 943 F.2d 335, 341 (3rd Cir. 1991) (appointment of receiver confers upon the court federal jurisdiction to decide all questions incident to the preservation, collection and distribution of assets whether such questions are raised in the original suit or ancillary proceedings); *Tcherepnin v. Franz*, 485 F.2d 1251, 1255-56 (7th Cir. 1973) (so long as an action commenced by a court-appointed receiver seeks to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is ancillary so far as the jurisdiction of the federal court is concerned); *In re Cuyahoga Finance Co.*, 136 F.2d 18 (6th Cir. 1943) (appointment of receiver confers upon court jurisdiction to decide all questions incident to preservation, collection, and distribution of assets); *Doyne v. Saetelle*, 112 F.2d 155, 162(8th Cir. 1940) ("Federal court may grant injunction without violating § 265 when proceeding in State court affects the control, possession or disposition of a *res* of which the federal

the receiver moved to have the IRS address the tax issues, the receiver did so as an officer of the Court, not as a representative of a private party. *Porter v. Sabin*, 149 U.S. 473, 479; *U.S. v. Smallwood*, 443 F. 2d 535, 539 (8th Cir. 1971), *cert. denied*, 404 U.S. 853 (1971). In seeking that relief the receiver represented "the court in its inherent power to

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court has first acquired jurisdiction"); *Genecov v. Wine*, 109 F.2d 265, 267 (8th Cir. 1940) (noting that actual or constructive possession of debtor's property gives court exclusive rights to determine all questions incident to collection, preservation and distribution of such property); *Taylor v. Producers Pipe & Supply Co.*, 114 F.2d 785, 788 (10th Cir. 1940) (receivership court has jurisdiction to decide all matters in dispute and decree complete relief); *Warder v. Brady*, 115 F.2d 89 (4th Cir. 1940) (receiver has federal jurisdiction to decide all questions incident to preservation, collection, and distribution of assets and "may, despite section 265 of the Judicial Code (28 U.S.C. § 379) issue under section 262 or otherwise, all writs necessary to protect from interference all property in its possession"); *Texas Co. v. Hauptman*, 91 F.2d 449, 454 (9th Cir. 1937) (power of court to issue injunction to protect its jurisdiction is an application of the general principle that, where a court of competent jurisdiction acquires possession of property, the court may issue all writs necessary to protect its possession from physical interference and determine all questions respecting the same); *Orcutt v. Crawford*, 85 F.2d 146, 147 (10th Cir. 1936) (receivership court has power to decide all questions relating to the preservation, collection, and distribution of the assets, including making of orders in the original proceeding and cognizance of ancillary actions appropriately instituted by the receivers in behalf of the estate); *Irving Trust Co. v. Fleming*, 73 F.2d 423, 427 (4th Cir. 1934) (where a court of competent jurisdiction has taken possession of property, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same); *KeSun Oil Co. v. Hamilton*, 61 F.2d 215, 219 (9th Cir. 1932) (federal receivership court may, despite section 265 of the Judicial Code (28 U.S.C.A. § 379), issue under section 262 (28 U.S.C.A. § 377), or otherwise, all writs necessary to protect from interference all property in its possession); *Toledo, St. L. & K.C.R. Co. v. Continental Trust Co.*, 95 F. 497 (6th Cir. 1899) (where receiver court has possession of all property, court has jurisdiction over all suits and proceedings with respect to the property).

> wind up" the receivership estate. *White v. Ewing*, 159 U.S. at 40. When the District Court entered the subject orders it did not do so to "assist a taxpayer in bypassing" IRS procedures, as characterized by the court of appeals. 245 F.3d at 1167. To the contrary, the District Court entered those orders pursuant to the "inherent power . . . necessarily vested in courts to achieve the orderly and expeditious disposition of cases." *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962) (internal quotation marks omitted) and only after the IRS indicated it could meet the timetable established by the District Court.[11]

The leading commentator on receiverships describes the proposition as follows:

> When a court of equity takes into its possession property and appoints a receiver thereof, it is the court's duty to protect that property against the wrongful act of anyone, be he party to the original suit or other person. Ordinary processes of the law can reach and appropriate the property *in custodia legis*. . . . This jurisdiction exercised by the appointing court is called auxiliary jurisdiction and sometimes called ancillary jurisdiction.
> **A court which is administering property already in its hands through a receivership may properly**

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[11] It cannot be disputed that the District Court found the orders were necessary to wind-up and terminate the receivership. "Until the tax liabilities of the various entities are determined, it will not be feasible to wind-up the receivership. Magistrate Judge Schlatter's Order of May 9, 2000 represents an effort to resolve the question of tax liabilities so that the receivership can be terminated." (App ??)

> **draw to itself all disputes as to liens and other rights upon or pertaining to such property**. This is done on the broad principle that every court has inherent equitable power to prevent its own process from working injustice to anyone and may entertain a petition by an aggrieved person, either in the form of a simple motion or by intervention *pro interesse suo* in the case in which the process issued, by auxiliary or dependent bill in equity.

1 Ralph Ewing Clark, *Clark on Receivers* § 280 (4th Ed. 1959) (emphasis added; citations omitted).

In short, the Act did not "grant" the right to issue a declaratory judgment to a receivership court, as the Court of Appeals incorrectly stated. A receivership court already had that right as an inherent power.[12]

In the case at bar, the Court of Appeals said, "there are no relevant exceptions under the Declaratory Judgment Act that permit the district court to determine their tax liabilities." 245 F.3d at 1166. It also said, "the Anti-Injunction Act prohibits the district court from enjoining the IRS from assessing and collecting the corporations taxes for failure to evaluate their tax returns by the court-imposed deadline." *Id.*, at 1167. **Not once in its opinion did the court acknowledge the *in rem* nature of the receivership**, nor the copious opinions from this Court which hold that Title 28 does not affect the inherent power of a District Court supervising a receivership. It did not recognize the District Court's "exclusive jurisdiction to determine all judicial questions concerning the *res*." *Wabash Railroad,* 208 U.S. at

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[12]To complete the thought, what the Act granted was the power to a court sitting at law, or with no other equitable claims before it, the right to enter declaratory relief. As the cases cited in note 10 show, a court sitting supervising a receivership already had that authority.

38. Nor did it recognize the District Court's inherent power to enter to subject orders. That was its fatal error.[13]

At the time of the District Court orders concerning the tax issues the *res* of the receivership consisted in part of approximately $1.2 million derived from the 1999 sale. All of the receivership's creditor and administrative claims had been paid in full. Quantifying the supposed federal income tax liabilities payable from the *res* was the last major obstacle to winding up the receivership.[14]

In this circumstance, we have a distinguished, senior federal judge waiting for a mid-level bureaucrat **who intervened in her courtroom** to decide that the District Court's agenda is sufficiently important for the bureaucrat to complete an assessment that could have been completed

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[13] In the Opinion, the Court of Appeals stated that the Declaratory Judgments Act was jurisdictional. 245 F.3d at 1166. This is squarely in conflict with opinions of this Court. *E.g. Schilling v. Rogers*, 363 U.S. 666, 677 (1960) (the Act is merely remedial, not jurisdictional); *Skelly v Phillips*, 339 U.S. 667, 671 (1950) (Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction); *Aetna v. Haworth*, 300 U.S. 227, 240 (1937) ("Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish.").

[14] The District Court had also ordered the IRS to complete its assessment of three related bankruptcies. This was also reversed in the Court of Appeals' Opinion. The Receiver does not seek certiorari on this issue; only on the issue of receivership taxes. The receiver also notes that the Tenth Circuit Opinion, claiming the receiver was relying on 26 U.S.C. § 505(b) for authority for the District Court to order the IRS to complete its assessment of receivership taxes, is incorrect, and probably arose out of the Tenth Circuit's confusion in this regard. The receiver was relying on § 505(b) for authority to order the IRS to assess on the Bankruptcy Cases. As to the receivership taxes, the subject of this petition, the receiver relied on *Riehle v. Margolies, supra,* and the other cases discussed in that section of this Petition.

years ago. Simply put, the Tenth Circuit resolved that separation of powers issue by ceding an inherent power to the bureaucrat, and it should have been resolved in favor of the Judge.

B. The Legislative History of the Declaratory Judgment Act Shows It Was Not Intended to Restrict the Inherent Power of the District Court.

Since it is clear under the above cited authorities (and others too numerous too list here) that a receivership had jurisdiction to enter a declaratory order **before** passage of the Act, the questions raised are (a) whether Congress could take away such authority and (b) whether Congress, in fact, did so. Although the answer to the former is unclear, the answer to the latter is clearly, "no".

As enacted in 1934, the Declaratory Judgment Act contained no exception for tax issues. It was amended in 1935, however, to add the "tax exception." The House of Representatives, Conference Report 74-1-1885 (August 22, 1935) provides the entirety of the legislative history on that exception as follows:

> DECLARATORY JUDGMENTS AS TO TAXES
>
> The Amendment also adds a section making it clear that **the Federal Declaratory Judgments Act of June 14, 1934 has no application to Federal Taxes**. (Emphasis added.)

This history shows that the tax exception affects only the statutory remedy originally granted in the 1934 Act, and was not intended to restrict the pre-existing inherent power of federal receivership courts, confirmed by the decisions of this

Court, to enter "any order" necessary for the distribution of assets, "any other provision of Title 28 notwithstanding." If Congress had intended the tax exception to restrict that power, that intent surely would appear in the legislative history. Congress' silence on the matter effectively disclaims such an intention. *E.g.*, *INS v. St. Cyr*, __ U.S. __, 121 S. Ct. 2271, 2290 n.44 (2001) (finding silence in legislative history significant on the theory that "where construction of legislative language makes so sweeping and so relatively unorthodox a change as that [purportedly] made here, . . . judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.") (internal quotation marks and citation omitted).

Moreover, the legislative history expresses an intent to change only the "application" of the Act, thus there is no hint Congress intended to try to take away a long-standing, inherent power. Given the breadth of powers then enjoyed by receivership courts, if Congress had intended to limit those powers it would have said so. To find a broader congressional intent would be contrary to established rules of statutory construction. *E.g.*, *United States v. American Bell Telephone*, 159 U.S. 548 (1895) (where statute purports to restrict otherwise existent jurisdiction, it must be narrowly construed); *Heno v. Federal Deposit Ins. Corp.*, 996 F.2d 429 (5th Cir. 429) (enactments limiting federal court jurisdiction are to be narrowly construed); *Magno v. United States*, 636 F.2d 714 (D.C. Cir. 1980) ("in areas where Congress has limited judicial review over questions which are within the normal competence of the courts, those jurisdictional limitations are interpreted narrowly . . .").

The Court of Appeals was concerned that the District Court's determination of tax questions would impede the government's collection and assessment of taxes. 245 F.3d at 1166. That concern is misplaced in the present setting. The District Court did not drag the IRS into this case. Instead, the

IRS injected itself into this case on its own motion. By voluntarily intervening, without condition or qualification, the IRS made itself "vulnerable to complete adjudication" by the District Court of the issues in litigation. *United States v. State of Oregon*, 657 F.2d at 1014; *Alvarado v. J.C. Penney Co.*, 997 F.2d at 805. It thereby acceded to the District Court's jurisdiction to decide "all questions respecting the title, the possession or the control of the" receivership property. *Wabash Railroad v. Adelbert College*, 208 U.S. 38, 54.[15]

Further, it should be noted that the IRS does not suggest it could not have finished its assessment on the time table Ordered by the District Court. Rather, it simply argues that it cannot be made to do so. Having intervened in the

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[15]The proper defense to a receiver trying to obtain a declaratory judgment regarding taxes when the IRS has not intervened is not found in the Act, but in the doctrine of sovereign immunity. The intervention, however, waived that sovereign immunity for all purposes relating to the *res* in an *in rem* case. *United States v. The Thekla*, 266 U.S. 328, 340-341 (1924) ("When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with respect to the subject matter."); *The Siren*, 74 U.S. (7 Wall) 152,153 (1868) ("[W]hen [the United States] proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and affirmative relief against them, beyond the demand or property in question."). *See also Cororporacion Mexicana de Servicios Maritimos, S. A. di C. V. v. The M/T Respect*, 89 F.3d 650,656 (3rd Cir. 1996) (by intervening in an *in rem* action agency of the Mexican Government waived sovereign immunity). As payment of taxes is necessarily something that affects the *res*, an Order that the IRS complete its assessment in a reasonable time is proper.

The Tenth Circuit decision is contrary to *The Thekla, The Siren*, and the cited decisions of the Ninth Circuit. It is also contrary to an earlier Tenth Circuit decision, *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1997).

case, it has waived sovereign immunity and must be treated like any other party. *See* n.15.

III. THE OPINION IS ALSO CONTRARY TO PRIOR OPINIONS OF THIS COURT RECOGNIZING JUDICIALLY-CREATED EXCEPTIONS TO THE ACT

Even if, contrary to the analysis above, the Act did govern the District Court's power in this case, the tax exception of the Act would not apply. This case falls within both of two judicially-created exceptions to that exception, which authorize declaratory relief when, as here, (1) the taxpayer has no other forums for relief; and (2) the IRS has no chance to prevail on the merits. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-737 (1974) (recognizing two unwritten, judicially created exceptions to the prohibition on declaratory judgments regarding federal taxes); *Elia v. Connet*, 908 F.2d 521, 523, 526 (9th Cir. 1990) (same); *In re State of Cal. v. Regan*, 641 F.2d 721, 722-23 (9th Cir. 1981) (same).

The receiver cannot get relief outside the receivership court. The receiver is an arm of the District Court and the District Court has exclusive jurisdiction over claims, including the tax claims of the United States. *E.g.*, 28 U.S.C. § 959; *Wabash Ry. Co. v. Adelbert College*, 208 U.S. 38, 53 (1908) (receivership court's possession of the property gives such court exclusive jurisdiction to hear and determine all questions affecting title, possession, or control of the property); *Oppenheimer v. San Antonio Land & Irrigation Co.*, (5th Cir. 1917) (an effect of the receivership court's

taking possession was withdrawal of the property from the jurisdiction of all other courts); 26 U.S.C. § 6871(c)(1)[16].

In *South Carolina v. Regan* 465 U.S. 367, 374 (1984), this Court held that the prohibition against injunctive suits would not apply if Congress did not provide the moving party with an alternative. Here, Congress has not provided an alternative. To the contrary, the IRS has simply refused to assess, despite its repeated admissions that it is capable of doing so. There appears to be no point to the IRS's actions except to prove that it is not subject to the power of the United States District Court, even in cases where it has intervened.

Moreover, the IRS cannot prevail in this case. For the IRS to prevail, it first must assess. It has not done so, and until it does the Court must rely on the receiver's CPA and the original IRS field agent working on this case, both of whom indicated no taxes are due. In short, there is no claim for taxes upon which the IRS can prevail.

Further, for there to be a tax, the IRS must either reallocate sale proceeds[17] that were distributed long ago or

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[16]The exceptions reflect that the Acts apply only in the typical situation where a taxpayer invokes the District Court's *in personam* jurisdiction despite alternative remedies. The Acts were not designed for this unusual situation, where the District Court's *in rem* powers as a receivership give it exclusive authority to resolve the tax issues based upon the IRS's intervention under Fed.R.Civ.P. 24.

[17] The IRS has suggested that it can re-allocate the sale proceeds only for tax purposes under 26 U.S.C. § 482. That section can only be invoked, however, against a "controlled taxpayer." As set forth in Treasury Regulation § 1.482-1A(b), "[t]he purpose of section 482 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer ... [where the] standard to be applied in every case is that of an uncontrolled taxpayer dealing at arms length with another uncontrolled taxpayer." The leading case on the application of 26 U.S.C. § 462 is *Commissioner of Internal Revenue v. First Security Bank of Utah* 405 U.S. 394, 400 (1972).

disregard Orders that were entered while it was a party. For the IRS to prevail, it must show that the Trustee or the receiver was under the "control" of another taxpayer. As both fiduciaries were under the control of their respective Courts, neither was under a "controlled taxpayer" within the meaning of 26 U.S.C. § 482. If this Court has any doubt about the IRS's chances of prevailing, the proper course is a remand to the District Court for a determination of the "*Bob Jones* exceptions."[18]

CONCLUSION

The decision of the Tenth Circuit ignores controlling precedent and thereby reached an erroneous result. By intervening without qualification or condition, the IRS waived sovereign immunity and acceded to the District Court's exclusive jurisdiction to answer all questions question affecting the receivership property. This included the inherent power to issue declaratory relief.

The Court had inherent power to enter the subject orders, unaffected by the Declaratory Judgment or Anti-Injunction Acts. Both Acts were intended to keep the judicial branch from interfering with the executive branch at the behest of a private taxpayer. That intention is not implicated when the executive branch intervenes in a receivership, and, in order to wind-up that receivership, the District Court orders the executive branch to do its job within a reasonable time. Unless the court has that power, the judicial branch becomes subordinate to the executive branch. The decision of the Tenth Circuit cedes an inherent power of the District

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[18] A remand to determine whether either *Bob Jones* exceptions applies will go a long way to getting the Receivership Estate past the procedural roadblock the IRS has created. To respond, the IRS will have to do its job and quantify taxes owed, which is all the Order reversed by the Opinion required it to do in the first place.

Court and deprives the District Court of necessary remedies to properly administer the receivership.

The Tenth Circuit opinion is also contrary to well-established principles governing *in rem* proceedings, and cannot be correct. In an *in rem* proceeding, a court must be able to address all claims to the *res*, and this includes tax claims. If the IRS did not desire to have its tax claim heard by the receivership court, all it needed do was . . . nothing. By not intervening, it would not have waived sovereign immunity and not subjected itself to Article III.

Finally, even if the Tax Limitation Acts apply, the Tenth Circuit should have remand for determination of the *Bob Jones* exceptions, rather than simply reversing. Because the District Court had ruled that the Tax Limitation Acts did not apply, there had been no need for the *Bob Jones* exceptions to be addressed. As the Tenth Circuit was the first court to determine the Tax Limitation Acts do apply, an analysis of the *Bob Jones* exceptions by the District Court would be appropriate.

WHEREFORE, Sterling Consulting Corporation, as receiver, prays that this Court grant certiorari on the three questions submitted above, or any of them, and for such other and further relief as the Court deems just and proper.

Respectively submitted this 5th day of November, 2001.

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